

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ANGELO PAUL VICTOR
PAMINTUAN,

Petitioner,

v.

DR. JEFFREY BEARD, Secretary of the
California Department of Corrections and
Rehabilitation,

Respondent.

Case No.: 15cv527-BEN (DHB)

**REPORT AND
RECOMMENDATION GRANTING
RESPONDENT’S MOTION TO
DISMISS**

[ECF No. 9]

Petitioner Angelo Paul Victor Pamintuan, a state prisoner proceeding *pro se*, is seeking federal habeas relief pursuant to 28 U.S.C. § 2254 by challenging the conviction and sentence imposed by the San Diego County Superior Court in case number SCN279791. (ECF No. 6 at 1.)¹ On June 16, 2015, Respondent moved to dismiss the First Amended Petition asserting it is time barred pursuant to 28 U.S.C. § 2244(d). (ECF No. 9.) On July 16, 2015, Petitioner filed a response in opposition to Respondent’s motion to dismiss. (ECF No. 13.) Respondent did not file a reply.

¹ Page numbers for docketed materials cited in this Report and Recommendation refer to those imprinted by the Court’s electronic case filing (“ECF”) system.

1 After a thorough review of the pleadings and all supporting documents, the Court
 2 finds the First Amended Petition is statutorily barred by the expiration of the limitations
 3 period and that Petitioner is not entitled to statutory or equitable tolling. Accordingly, the
 4 Court **RECOMMENDS** that Respondent's motion to dismiss be **GRANTED**.

5 **I. PROCEDURAL BACKGROUND**

6 Petitioner pleaded no contest to a charge of assault with a deadly weapon likely to
 7 cause great bodily injury in violation of California Penal Code § 245(a)(1). (ECF No. 10-
 8 1 at 1.) Petitioner also admitted to having a prior felony conviction resulting in a five-year
 9 enhancement. (*Id.*) On December 1, 2010, the trial court sentenced Petitioner to thirteen
 10 years in prison. (ECF No. 10-3 at 1.) Petitioner did not file an appeal of the conviction in
 11 the California Court of Appeal, nor did he seek review of the conviction in the California
 12 Supreme Court. (ECF No. 6 at 2.)

13 On July 7, 2014, Petitioner filed in the trial court a motion to modify the five-year
 14 enhancement arguing that the interests of justice would be served because (a) his trial
 15 attorney was ineffective in advising Petitioner to accept the plea, and (b) he had been
 16 rehabilitated in prison. (ECF No. 10-2.) However, on August 13, 2014, the trial court
 17 denied the motion after determining that it lacked jurisdiction to strike the enhancement
 18 and the motion was untimely. (ECF No. 10-3.)

19 On September 2, 2014, Petitioner constructively filed a petition for writ of mandate
 20 to the California Court of Appeal to challenge the trial court's denial of his motion to
 21 modify his sentence. (ECF No. 10-4.) On September 16, 2014, the California Court of
 22 Appeal denied the petition without comment. (ECF No. 10-5.)

23 On October 6, 2014, Petitioner constructively filed a petition for writ of habeas
 24 corpus in the California Supreme Court claiming that the trial court abused its discretion
 25 in denying his motion to modify the enhancement. (ECF No. 10-6.) On January 14, 2015,
 26 the California Supreme Court denied the petition without comment. (ECF No. 10-7.)

27 On March 3, 2015, Petitioner constructively filed a petition for writ of habeas corpus
 28 in the Southern District of California, thereby commencing this action. (ECF No. 1.) On

1 March 23, 2015, the Court dismissed the petition due to Petitioner's failure to (a) pay the
2 \$5.00 filing fee; (b) allege exhaustion of state judicial remedies; and (c) sign the petition.
3 (ECF No. 4.) To reopen the case, the Court required Petitioner to pay the filing fee and
4 submit a First Amended Petition for Writ of Habeas Corpus curing the pleading
5 deficiencies. (*Id.* at 4:4-7.) On April 10, 2015, Petitioner filed the First Amended Petition.
6 (ECF No. 6.)

7 The First Amended Petition raises a single ground for relief. Petitioner asserts that
8 the state trial court abused its discretion and denied him due process by denying his motion
9 to modify the sentence enhancement. (*Id.* at 6.) Petitioner argues his trial counsel failed
10 to provide adequate legal representation and failed to "at the very least explain[] what the
11 charges petitioner was pleading to on the [plea] agreement, such as the fact that Petitioner
12 would receive a FIVE YEAR PRISON ENHANCEMENT consecutive to the prison term
13 for the acts themselves," and "Petitioner did not have the opportunity to have his defense
14 counsel properly challenge any of the charged offenses, nor did counsel file any meaningful
15 motions to dismiss any charges, and work to receive a more favorable sentence. Petitioners
16 [sic] counsel was ineffective for failing to at the very least, challenge the five year
17 enhancement to a one-year enhancement instead." (*Id.* at 14:11-19.) Petitioner argues he
18 "was denied the right to trial by jury and to confront his accusers, in violation of the Due
19 Process Clause, and the Sixth Amendment, and amounting to violations of the Eighth
20 Amendment [prohibition against] Cruel [sic] Punishment." (*Id.* at 6.) Petitioner seeks to
21 have the five-year enhancement reduced to a one-year enhancement. (*Id.* at 14:20-22.)

22 On June 16, 2015, Respondent filed a motion to dismiss the First Amended Petition,
23 asserting that Petitioner commenced this action after the expiration of the statute of
24 limitations. (ECF No. 9.) On July 16, 2015, Petitioner filed an opposition to Respondent's
25 motion to dismiss. (ECF No. 13.)

26 II. DISCUSSION

27 Respondent argues the Court should dismiss the First Amended Petition because this
28 action is time barred by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d).

(ECF No. 9 at 3.) Pursuant to the Antiterrorism and Effective Death Penalty Act (“AEDPA”), as amended, “[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.” 28 U.S.C. § 2244(d)(1). The limitation period begins to run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D).

In California, when a prisoner does not appeal his conviction, the judgment becomes final sixty days after entry of judgment. *See* CAL. R. CT., RULE 8.104. Here, Petitioner did not appeal his conviction in state court. (ECF No. 6 at 2.) Thus, his judgment became final on January 30, 2011, which is sixty days after the trial court sentenced him on December 1, 2010. (ECF No. 6 at 1; ECF No. 10-1 at 1.) The statute of limitations begins to run on the day after judgment becomes final and terminates on the last day of the limitation period. *See* FED. R. CIV. P. 6(a)(1). Thus, absent a later start date or any tolling, Petitioner had one year, until January 31, 2012, to file a federal habeas petition. Petitioner constructively commenced this action on March 3, 2015,² more than three years after AEDPA’s one-year

² The Court finds that Petitioner should be afforded the benefit of the “prison mailbox rule,” which provides that a *pro se* prisoner’s pleading is deemed filed as of the date the pleading is delivered to prison officials. *See Miles v. Prunty*, 187 F.3d 1104, 1106 n.2 (9th Cir. 1999). Here, Petitioner delivered his initial petition to prison officials on March 3,

1 statute of limitations expired. Therefore, this action is untimely unless Petitioner is entitled
 2 to a later limitations start date, statutory tolling, or equitable tolling.

3 **A. Commencement of Limitations Period**

4 As noted above, AEDPA provides for a one-year statute of limitations, although
 5 AEDPA postpones the date on which the limitations period begins to run when the prisoner
 6 is unable to file the petition due to a state-created impediment, upon the retroactive
 7 application of a newly-recognized constitutional right, or because the factual predicate for
 8 a claim was not previously known despite due diligence. *See* 28 U.S.C. § 2244(d)(1)(A)-
 9 (D). Petitioner does not argue that a state-created impediment prevented him from filing a
 10 timely petition, nor does he contend that the Supreme Court recently recognized and made
 11 retroactive the constitutional rights underlying his claims. However, in viewing the
 12 pleadings in the light most favorable to Petitioner, Petitioner does assert an argument under
 13 28 U.S.C. § 2244(d)(1)(D), which acts to postpone the limitations start date to “the date on
 14 which the factual predicate of the claim or claims presented could have been discovered
 15 through the exercise of due diligence.”

16 Specifically, Petitioner contends that he “was 19 years old at the time [of his plea],
 17 and had a lack of knowledge regarding penal codes, and strike enhancements, counsel
 18 should have informed his client what the strike enhancement was, and petitioner . . . would
 19 have likely pursued trial.” (ECF No. 6 at 14:22-25.) Petitioner also argues in his opposition
 20 to Respondent’s motion to dismiss:

21
 22 In 2010 the Petitioner knew nothing about the legal system. Petitioner’s trust
 23 was in the public defendant’s office, who was inadequate. After the guilty
 24 plea, Petitioner educated himself by getting a college degree so that he could
 25 continue to exercise his due diligence and pursue injustice. Petitioner sought
 26 help, but no [one] would help him without charging a fee. Petitioner finally
 found free help. . . . Petitioner has been working on this case for years, and a

27 2015, although the petition was not filed on the Court’s docket until March 6, 2015. (ECF
 28 No. 1 at 74.) However, even affording Petitioner the benefit of this rule, this action is still
 untimely, for the reasons discussed herein.

1 few weeks ago he discovered his current charge [California Penal Code
2 §] 245(a)(1), assault by force likely to produce [great bodily injury], was used
3 as the second component of his five year enhancement, but it is not a serious
4 or violent crime per s.s. 1192.7 or 667.5. Petitioner is factually innocent of
the 667 (a) five year enhancement.

5 (ECF No. 13 at 3:1-11.)

6 The Court is not persuaded by Plaintiff's argument. Petitioner knew or should have
7 known in 2010 that his plea would result in a thirteen-year prison sentence that included a
8 five-year enhancement, as the December 1, 2010 Abstract of Judgment clearly indicates as
9 much (*see* ECF No. 10-1 at 1), and Petitioner was aware of the legal services his counsel
10 provided him. What Petitioner apparently did not understand was the legal significance of
11 those facts. However, for purposes of 28 U.S.C. § 2244(d)(1)(D), "the 'due diligence'
12 clock starts ticking when a person knows or through diligence could discover the vital facts,
13 regardless of when their legal significance is actually discovered." *Ford v. Gonzalez*, 683
14 F.3d 1230, 1235 (9th Cir. 2012) (citing *Redd v. McGrath*, 343 F.3d 1077, 1082 (9th Cir.
15 2003); *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001)). Because Petitioner
16 knew or should have known of the factual predicate of his claim in 2010 yet he waited
17 more than three years after the statute of limitations expired to seek federal habeas relief,
18 Petitioner did not exercise the due diligence required to permit a later limitations start date
19 under 28 U.S.C. § 2244(d)(1)(D). Thus, the statute of limitations expired on January 31,
20 2012, which is one year from the date Petitioner's judgment became final.

21 **B. Statutory Tolling**

22 **1. Legal Standard**

23 AEDPA's one-year limitations period is tolled during the period of time a petitioner
24 seeks post-conviction relief in state court. 28 U.S.C. § 2244(d)(2). Specifically, AEDPA's
25 statutory tolling provision provides: "The time during which a properly filed application
26 for State post-conviction or other collateral review with respect to the pertinent judgment
27 or claim is pending shall not be counted toward any period of limitation under this
28 subsection." *Id.* Tolling begins "from the time the first state habeas petition is filed until

1 the California Supreme Court rejects the petitioner’s final collateral challenge” as long as
 2 the petitions are properly filed. *Evans v. Chavis*, 546 U.S. 189 (2006).

3 **2. Analysis**

4 Here, Petitioner is not entitled to statutory tolling. Petitioner’s conviction became
 5 final on January 30, 2011, yet he did not begin to seek collateral relief in state court until
 6 July 7, 2014, when he filed a petition for writ of mandate. By that time, however, the one-
 7 year limitations period had long-since expired, and his subsequent state petitions, even if
 8 “properly filed,” do not serve to revive the already-expired statute of limitations.
 9 Accordingly, the Court finds Petitioner is not entitled to statutory tolling.

10 **C. Equitable Tolling**

11 **1. Legal Standard**

12 The United States Supreme Court has determined that equitable tolling is available
 13 under 28 U.S.C. § 2244(d) in appropriate cases. *See Holland v. Florida*, 560 U.S. 631, 645
 14 (2010). In *Holland*, the Supreme Court recognized equitable tolling of AEDPA’s one-year
 15 limitations period only when the prisoner can show “‘(1) that he has been pursuing his
 16 rights diligently, and (2) that some extraordinary circumstance stood in his way’ and
 17 prevented timely filing.” *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418
 18 (2005)). The Ninth Circuit has also held that AEDPA’s one-year statute of limitations is
 19 subject to equitable tolling. *See Corjasso v. Ayers*, 278 F.3d 874, 877 (9th Cir. 2002)
 20 (“AEDPA’s statute of limitations provision is subject to equitable tolling.”); *Calderon v.*
 21 *United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other*
 22 *grounds by Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998).
 23 However, the Ninth Circuit in *Beeler* noted that “[e]quitable tolling will not be available in
 24 most cases, as extensions of time will only be granted if ‘extraordinary circumstances’
 25 beyond a prisoner’s control make it impossible to file a petition on time.” *Beeler*, 128 F.3d
 26 at 1288 (quoting *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996)); *see*
 27 *also Miles*, 187 F.3d at 1107 (equitable tolling is “unavailable in most cases.”). “[T]he
 28 threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the

1 exceptions swallow the rule.” *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002)
 2 (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000)). District judges
 3 must “take seriously Congress’s desire to accelerate the federal habeas process” and “only
 4 authorize extensions when this high hurdle is surmounted.” *Beeler*, 128 F.3d at 1289. The
 5 extraordinary circumstances must be the “but-for and proximate cause” of the untimely
 6 filing. *Allen v. Lewis*, 255 F.3d 798, 800 (9th Cir. 2001).

7 A habeas petitioner “bears the burden of showing that equitable tolling is
 8 appropriate.” *Gaston v. Palmer*, 417 F.3d 1030, 1034 (9th Cir. 2005). In other words, the
 9 burden is on Petitioner to show that “extraordinary circumstances” were the proximate
 10 cause of his untimeliness, rather than merely a lack of diligence on his part. *Spitsyn v.*
 11 *Moore*, 345 F.3d 796, 799 (9th Cir. 2003); *Stillman v. LaMarque*, 319 F.3d 1199, 1203 (9th
 12 Cir. 2003).

13 When courts assess a habeas petitioner’s argument in favor of equitable tolling, they
 14 must conduct a “highly fact-dependent” inquiry. *Whalem/Hunt v. Early*, 233 F.3d 1146,
 15 1148 (9th Cir. 2000); *see also Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999) (“As a
 16 discretionary doctrine that turns on the facts and circumstances of a particular case,
 17 equitable tolling does not lend itself to bright-line rules.”).

18 Petitioner’s status as a *pro se* litigant, though not by itself sufficient to warrant
 19 equitable tolling, is relevant. *See Roy v. Lampert*, 465 F.3d 964, 967, 970 (9th Cir. 2006)
 20 (in considering whether equitable tolling applies, court “consider[ed] it highly relevant that
 21 [petitioners] were proceeding *pro se* until appointed counsel by the district court. . . . [E]ven
 22 though *pro se* status alone is not enough to warrant equitable tolling, it informs and colors
 23 the lens through which we view the filings, and whether these filings made sufficient
 24 allegations of diligence.” (citing *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
 25 Cir. 1990)).

26 **2. Analysis**

27 As noted above, Petitioner claims he did not know that his trial counsel was
 28 rendering him bad legal advice regarding the plea, and that he lacked knowledge of the

1 legal significance of the facts surrounding his plea and sentence enhancement. To establish
 2 equitable tolling, Petitioner is required to show: “(1) that he has been pursuing his rights
 3 diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace*, 544 U.S.
 4 at 418.

5 For the same reasons discussed above, Petitioner’s efforts to obtain an education do
 6 not entitle him to equitable tolling. Petitioner had knowledge of the facts that led to his
 7 plea and sentence in 2010. Petitioner attempts to satisfy the due diligence requirement by
 8 explaining that he obtained a college degree and that he “has been working on this case for
 9 years.” (ECF No. 13 at 3:7.) Such a generalized statement is not sufficient to establish
 10 due diligence. Neither is Petitioner’s claim that he did not discover until “a few weeks
 11 ago” the legal significance of certain facts. In addition, Petitioner fails to establish the
 12 existence of any “extraordinary circumstances” that prevented him from seeking federal
 13 habeas relief at an earlier time. Equitable tolling would be available for the vast majority
 14 of federal habeas petitioners if a lack of legal education amounted to “extraordinary
 15 circumstances” sufficient to qualify for equitable tolling. However, equitable tolling “is
 16 unavailable in most cases,” *Miles*, 187 F.3d at 1107, “lest the exceptions swallow the rule.”
 17 *Miranda*, 292 F.3d at 1066 (quoting *Marcello*, 212 F.3d at 1010).

18 In conclusion, the Court finds that Petitioner has not satisfied his burden of
 19 demonstrating that equitable tolling is appropriate because he fails to demonstrate that he
 20 has been pursuing his rights diligently and the existence of extraordinary circumstances
 21 that prevented him from timely seeking federal habeas relief.

22 **D. Actual Innocence**

23 As noted above, Petitioner claims he “is factually innocent of the 667(a) five year
 24 enhancement.” (ECF No. 13 at 3:10-11.) The Court construes this statement to be an
 25 argument that Petitioner is actually innocent of the underlying prior conviction which is
 26 the basis for the five-year enhancement.

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28 ///

1 **1. Legal Standard**

2 The Supreme Court has recognized that AEDPA's statute of limitations is subject to
 3 an "actual innocence" exception." *See McQuiggin v. Perkins*, ___ U.S. ___, 133 S. Ct.
 4 1924, 1931-32 (2013); *see also Lee v. Lambert*, 653 F.3d 929, 932 (9th Cir. 2011) (en banc)
 5 (holding "that a credible claim of actual innocence constitutes an equitable exception to
 6 AEDPA's limitations period."). "In order to present otherwise time-barred claims to a
 7 federal habeas court under *Schlup*, a petitioner must produce sufficient proof of his actual
 8 innocence to bring him 'within the narrow class of cases . . . implicating a fundamental
 9 miscarriage of justice.'" *Lee*, 653 F.3d at 937 (quoting *Schlup v. Delo*, 513 U.S. 298, 314-
 10 15 (1995)). *Schlup* provides that if a petitioner "presents evidence of innocence so strong
 11 that a court cannot have confidence in the outcome of the trial unless the court is also
 12 satisfied that the trial was free of nonharmless constitutional error, the petitioner should be
 13 allowed to pass through the gateway and argue the merits of his underlying claims."
 14 *Schlup*, 513 U.S. at 316. *Schlup* requires that a "petitioner must show that it is more likely
 15 than not that no reasonable juror would have convicted him in the light of the new
 16 evidence." *Id.* at 327. "This exacting standard 'permits review only in the extraordinary
 17 case,' but it 'does not require absolute certainty about the petitioner's guilt or innocence.'" *Lee*,
 18 653 F.3d at 938 (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)). *Schlup* further
 19 requires a "petitioner to support his allegations of constitutional error with new reliable
 20 evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts,
 21 or critical physical evidence -- that was not presented at trial." *Schlup*, 513 U.S. at 324. A
 22 federal habeas court then "considers all the evidence, old and new, incriminating and
 23 exculpatory," to determine "what reasonable, properly instructed jurors would do." *Lee*,
 24 653 F.3d at 938 (citing *House*, 547 U.S. at 538; *Carriger v. Stewart*, 132 F.3d 463, 477-78
 25 (9th Cir. 1997) (en banc)). "'[A]ctual innocence' means factual innocence, not mere legal
 26 insufficiency." *Bousley v. United States*, 523 U.S. 614, 624 (1998) (citing *Sawyer v.*
 27 *Whitley*, 505 U.S. 333, 339 (1992)).

28 ///

1 However, it has been recognized that “[t]he *Schlup* test does not work well with a
 2 petitioner who has pled guilty or no contest rather than gone to trial.” *Lewis v. Spearman*,
 3 No. C 12-6221 SI (pr), 2013 U.S. Dist. LEXIS 145827, at *9 n.2 (N.D. Cal. Oct. 7, 2013).
 4 In *Lewis*, the court assumed without deciding “that the actual innocence gateway would be
 5 available to a petitioner who has pled no contest,” but the court recognized that it “is an
 6 open question.” *Id.* (citing *Smith v. Baldwin*, 510 F.3d 1127, 1140 n.9 (9th Cir. 2007) (en
 7 banc)). In *Smith*, the Ninth Circuit similarly assumed that *Schlup*’s actual innocence
 8 gateway was available to a petitioner that entered a no contest plea because “the state ha[d]
 9 not raised the argument and, more importantly, [the petitioner] ha[d] failed to satisfy the
 10 requirements under *Schlup*.” *Smith*, 510 F.3d 1140 n.9.

11 **2. Analysis**

12 In this case the Court will similarly assume that *Schlup*’s actual innocence gateway
 13 is available to Petitioner. However, Petitioner cannot pass through this gateway because
 14 he makes no effort to demonstrate he is actually innocent of the prior conviction underlying
 15 his sentence enhancement. Rather, he concedes he has a prior conviction. (*See* ECF No.
 16 13 at 4:2-6.) His argument is that the record does not demonstrate that his prior conviction
 17 is the type of conviction sufficient to trigger a five-year enhancement under California law.
 18 (*See id.*) This argument is unsupported by any evidence. Thus, the Court is left with the
 19 only available evidence on this issue, namely, that Petitioner admitted to having a prior
 20 conviction under California Penal Code §§ 667(a)(1) and 668.³ (*See* ECF No. 10-1.) Based
 21

22 ³ California Penal Code § 667 provides that “any person convicted of a serious felony
 23 [as defined in Penal Code § 1192.7(c)] in this state or of any offense committed in another
 24 jurisdiction which includes all of the elements of any serious felony, shall receive, in
 25 addition to the sentence imposed by the court for the present offense, a five-year
 26 enhancement for each such prior conviction on charges brought and tried separately.” CAL.
 PENAL CODE § 667(a)(1).

27 California Penal Code 668 provides that “[e]very person who has been convicted in
 28 any other state, government, country, or jurisdiction of an offense for which, if committed
 within this state, that person could have been punished under the laws of this state by

on this record, the Court cannot find that Petitioner has demonstrated a miscarriage of justice sufficient to excuse compliance with AEDPA's statute of limitations.

E. Evidentiary Hearing

In the caption of the First Amended Petition, Petitioner requests an evidentiary hearing. (ECF No. 6 at 1.) Although his First Amended Petition does not contain any substantive arguments in support of this request, Petitioner does raise the issue in his opposition to Respondent's motion to dismiss. Specifically, Petitioner contends that "[t]he merits of the factual dispute were not resolved in the state hearing. The Fact finding procedure employed by the state court was not adequate to afford a full and fair hearing." (ECF No. 13 at 6-9.) Petitioner further contends his "prior and current case rest on a guilty plea of a prior. There is no record of the underlying facts that during the burglary 'a person other than an accomplice was present in the residence during the commission of the burglary' [Cal. Penal Code §] 667.5(c)(21). Therefore, Petitioner's prior does not count as a strike prior." (*Id.* at 4:2-6.)

AEDPA prescribes the manner in which federal courts must approach the factual record and "substantially restricts the district court's discretion to grant an evidentiary hearing." *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999); *see also Cullen v. Pinholster*, 131 S. Ct. 1388, 1400-01 (2011) ("Section 2254(e)(2) imposes a limitation on the discretion of federal habeas courts to take new evidence in an evidentiary hearing.") (citing *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). In determining whether an evidentiary hearing is warranted, a district court presented with a request for an evidentiary hearing . . . must determine whether a factual basis exists in the record to support the petitioner's claim." *Baja*, 187 F.3d at 1078.

imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed by law and to the same extent as if that prior conviction had taken place in a court of this state. The application of this section includes, but is not limited to, all statutes that provide for an enhancement or a term of imprisonment based on a prior conviction or a prior prison term" CAL. PENAL CODE § 668.

1 [District courts must also] consider whether such a hearing could enable an
 2 applicant to prove the petition's factual allegations, which, if true, would
 3 entitle the applicant to federal habeas relief. . . . Because the deferential
 4 standards prescribed by § 2254 control whether to grant habeas relief, a
 5 federal court must take into account those standards in deciding whether an
 6 evidentiary hearing is appropriate. . . . It follows that if the record refutes the
 applicant's factual allegations or otherwise precludes habeas relief, a district
 court is not required to hold an evidentiary hearing.

7 *Schriro*, 550 U.S. at 474.

8 Initially, Petitioner's citation to California Penal Code § 667.5, which provides for
 9 the "[e]nhancement of prison terms for new offenses because of prior prison terms," is
 10 misplaced. That section provides that when a new offense is contained in that section's list
 11 of "violent felonies," a three-year enhancement will attach for each prior prison term served
 12 following conviction of prior "violent felonies." Here, however, Petitioner's sentence
 13 enhancement was based on Penal Code § 667, which, as detailed above, *see supra* note 3,
 14 provides for a five-year enhancement for any person previously convicted of a serious
 15 felony. These two sections provide for different enhancements (three years vs. five years)
 16 based on different lists of prior offenses (violent felonies vs. serious felonies). The fact
 17 that there is no record demonstrating the existence of a prior offense that would implicate
 18 § 667.5(c)(21) is immaterial, as that section was not the statutory basis of Petitioner's five-
 19 year enhancement. Thus, an evidentiary hearing is not necessary to enable Petitioner to
 20 prove his factual allegations.

21 Furthermore, because the record establishes that Petitioner's claim is barred by
 22 AEDPA's statute of limitations, as discussed above, Petitioner does not satisfy the exacting
 23 AEDPA standards prerequisite to receiving an evidentiary hearing, and his request is
 24 **DENIED.**

25 **F. Request for Appointment of Counsel**

26 In the caption of the First Amended Petition, Petitioner also requests that he be
 27 appointed counsel, although he does not make any substantive arguments in support of this
 28 request in either the First Amended Petition or his opposition. (ECF No. 6 at 1.)

1 The Sixth Amendment right to counsel does not extend to federal habeas corpus
 2 actions by state prisoners. *McCleskey v. Zant*, 499 U.S. 467, 495 (1991); *Chaney v. Lewis*,
 3 801 F.2d 1191, 1196 (9th Cir. 1986); *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir.
 4 1986). However, financially eligible habeas petitioners seeking relief pursuant to 28
 5 U.S.C. § 2254 may obtain representation whenever the court “determines that the interests
 6 of justice so require.” 18 U.S.C. § 3006A(a)(2)(B) (2010); *Terrovona v. Kincheloe*, 912
 7 F.2d 1176, 1181 (9th Cir. 1990); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir. 1984);
 8 *Hoggard v. Purkett*, 29 F.3d 469, 471 (8th Cir. 1994).

9 The interests of justice require appointment of counsel when the court conducts an
 10 evidentiary hearing on the petition. *Terrovona*, 912 F.2d at 1177; *Knaubert*, 791 F.2d at
 11 728; Rule 8(c), 28 U.S.C. foll. § 2254. The appointment of counsel is discretionary when
 12 no evidentiary hearing is necessary. *Terrovona*, 912 F.2d at 1177; *Knaubert*, 791 F.2d at
 13 728. As noted above, an evidentiary hearing is not warranted in this case. Thus,
 14 appointment of counsel is discretionary.

15 In the Ninth Circuit, “[i]ndigent state prisoners applying for habeas corpus relief are
 16 not entitled to appointed counsel unless the circumstances of a particular case indicate that
 17 appointed counsel is necessary to prevent due process violations.” *Chaney*, 801 F.2d at
 18 1196; *Knaubert*, 791 F.2d at 728-29. The Ninth Circuit considers the clarity and coherence
 19 of a petitioner’s district court pleadings to determine the necessity of appointment of
 20 counsel; if clear and understandable, the court typically finds appointment of counsel
 21 unnecessary. *LaMere v. Risely*, 827 F.2d 622, 626 (9th Cir. 1987.) “Where the issues
 22 involved can be properly resolved on the basis of the state court record, a district court does
 23 not abuse its discretion in denying a request for court-appointed counsel.” *Hoggard*, 29
 24 F.3d at 471.

25 Here, it does not appear that appointment of counsel is required to prevent a due
 26 process violation. There is no indication that the issues are too complex or that Petitioner
 27 is incapable of presenting his claims. In fact, Petitioner has been able to articulate the
 28 factual and legal bases of his claim in a thorough, clear, and coherent manner. Therefore,

1 the Court finds that the interests of justice do not require the appointment of counsel.
 2 Accordingly, Petitioner's motion for appointment of counsel is **DENIED**. CAL. PENAL
 3 CODE § 667(a)(1).

4 **III. CONCLUSION**

5 After a thorough review of the record in this matter and based on the foregoing
 6 analysis, the Court **RECOMMENDS** that Respondent's motion to dismiss be
 7 **GRANTED**.

8 The Court submits this Report and Recommendation to United States District Judge
 9 Roger T. Benitez pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(d) of the
 10 United States District Court for the Southern District of California.

11 IT IS HEREBY ORDERED no later than **December 23, 2015**, any party to this
 12 action may file written objections with the Court and serve a copy on all parties. The
 13 document should be captioned "Objections to Report and Recommendation."

14 IT IS FURTHER ORDERED that any reply to the objections shall be filed with the
 15 Court and served on all parties no later than **January 6, 2016**.

16 The parties are advised that failure to file objections within the specified time may
 17 waive the right to raise those objections on appeal of the Court's order. *See Turner v.*
 18 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir.
 19 1991).

20 IT IS SO ORDERED.

21 Dated: November 23, 2015



22 **DAVID H. BARTICK**
 23 United States Magistrate Judge
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